Yong Yit Swee & Ors v Sri Inai (Pulau Pinang) Sdn Bhd & Anor

SESSIONS COURT (GEORGETOWN) — SUMMONS NOS 53–25 OF 1992—53–33 OF 1992
HO MOOI CHING J
14 MAY 1995

Ho Mooi Ching J: In the early hours of 16 February 1989, there was a fire at premises No 1, Park Road, Pulau Pinang which claimed four lives and caused injury to five others. It is undisputed that the premises belonged to the second defendant, the Majlis Perbandaran Pulau Pinang ('MPPP') which had rented it out to the first defendant, Sri Inai (Pulau Pinang) Sdn Bhd and that the first defendant used it as a hostel for students attending the Sekolah Sri Inai ('the school').

The tenancy of the premises had been obtained by way of tender. Although the third party, one EM Augustin ('DW2') submitted the documents in his own name, he had signed them in his capacity as principal of the school as evidenced by the stamp endorsed on all the relevant documents (pp 13–15, 18 and 23 of Bundle A, an agreed bundle of documents). Correspondence relating to the tenancy (p 23 of Bundle A) was typed on paper carrying the letterhead of the school and the words used 'Sila hantar kepada *kami* satu salinan' (emphasis added) suggest that he was acting for the first defendant, rather than in his own personal capacity. He was also a director of the first defendant company which ran the school. In the absence of any evidence to the contrary, I accept that he was, at all material times, acting as the agent of first defendant. This fact was never disputed by the first defendant, nor was it seriously disputed by the MPPP. The application submitted by DW2 was approved by the MPPP by letter dated 19 December 1986 (p 19 of Bundle A). The tenancy for a term of two years was subsequently renewed for a further term of one year on the same terms, until 19 December 1989.

The building in question was a two-storey building, with the ground floor of brick with mortar covering and the first floor of timber frame and partition walls of brick (photo 3 of Bundle C referred to). At all material times, the top floor was occupied by 13 students attending Forms 3–5 in the school, and the ground floor by two wardens. Lee Boon Ming, Surin Thinagaran, Tan Hock San and Anand Govindarajoo died as a result of the fire and their parents sue for damages caused thereby (Summons Nos 53–26, 27, 28 and 33 of 1992). Teoh Hsium Choon ('PW2'), Lee Seng Chong ('PW4'), Vigneshwara a/l Kumarashwaran ('PW5'), Yeoh Ee Kee ('PW9') and Yong Yit Swee ('PW13') sue for damages in their own names (Summons Nos 53, 25, 29, 30, 31 and 32–92). All the abovementioned cases were consolidated.

At the close of the hearing, this court apportioned liability equally between the two defendants. There was no finding of contributory negligence against the students. Awards of general and special damages, interest and costs were made in all the cases. Both defendants now appeal

against the decision of this court in its entirety. I set out below the grounds for my decision.

The plaintiffs' claims are based on negligence and breach of statutory duty. I agree with the submissions of learned counsel for the plaintiffs, Mr M Thayalan that both defendants largely blame each other for the incident. However, the second defendant raised the question of contributory negligence by the students. As submitted, with regard to contributory negligence, the two issues to be decided were whether the students were wholly or contributorily negligent in not making a more timely escape from the burning premises and whether PW5 contributed to the negligence by switching on the water heater at night. However, as the second issue had not been pleaded as a particular of negligence, I do not propose to deal with it, except insofar as to say that there was no evidence that PW5 had switched on the heater and left it on that night or even if there had been such evidence, that such an act amounted to negligence. In any case, it would have no effect on the claims of the other plaintiffs.

Liability

The layout of the premises is as shown in the plans P1A and P1B. It is common ground that there were three rooms marked Form 3, Form 4 and Form 5. The rooms marked Form 3 and Form 4 were connected by way of a door marked 'Y. Another door in the Form 3 room had been sealed off by cabinets placed at 'X'. Four boys Surin, PW4, PW13 and Lee Boon Ming occupied the Form 3 room but at the relevant time, PW13 had bunked in with PW2 in the Form 4 room. The Form 4 room was occupied by Khor Seng Choong, Anand, PW2, PW14, Tan Hock San and Yap Lip San. The Form 5 room was occupied by PW5, PW9 and William Lee Kok Foong. The wardens Frederick Augustine and Saw Bang Leong ('DW1') occupied the room marked 'Warden's Room' in P1A.

The cause of the fire is relevant in determining liability. The plaintiffs called one Peter John Cook ('PW3') to testify regarding the cause of the fire and other related matters. PW3 came with highly impressive credentials as set out in exh P3. His evidence as a fire expert had been accepted by courts in Malaysia, Singapore and England. In the case of *Polyvitte Ltd v Commercial Union Assurance Co PLC* [1987] 1 Lloyd's Rep 379, Garland J (in exh P4) found PW3 'a careful and reliable witness, who gave his evidence with restraint and consistency'. I came to the same conclusion after hearing his evidence in this case. Not only was he unshaken in cross-examination, more importantly, he was able to give reasons for the theories advanced by him after taking into account the physical evidence. His findings were consistent with the accounts of witnesses who were at the scene at the time of the fire.

The second defendant called a chemist from the Chemistry Department, Ng Hock Sing ('DW3'), to testify as to the cause of the fire. It was clear from his evidence that he has had no special training in fire investigations and prevention. Although his evidence as an expert has been accepted by courts in Malaysia, there was no indication that this was in

relation to fire investigations. His opinion that the fire started in the Form 5 room was based on the fact that there were signs of intense heat on the walls and ceiling. The charring was near the beds but he disagreed that this was due to the mattresses having caught fire (photos 43 and 44). The warden, DW1 testified that he had seen falling debris outside his window but there was no evidence that the fire started in the Form 5 room, as submitted by learned counsel for the second defendant. When confronted with the testimony of the Form 5 boys that their room was not on fire, he admitted he may have been wrong about the origin of the fire. Although PW5 said he saw one of the beds in the room on fire, this was just before his second attempt to leave the room and not at the outset when they became aware of the fire. DW3 also admitted not knowing whether the fire originated in the roof void and offered no opinion as the cause of the fire. Although he had the advantage of being at the scene a few hours after the fire, his lack of specialized training in this field did not render this a very useful advantage. The unchallenged testimony of the Form 5 boys was at variance with his testimony and on the grounds stated, I did not accept his evidence nor his status as a fire expert.

The second defendant also called Shabudin bin Salleh ('DW9'), an engineer with Tenaga Nasional Bhd who conducted an inspection of the premises on 18 December 1989 and interviewed the warden Frederick Augustin and student, William Lee, both of whom were not called as witnesses, rendering parts of his report hearsay. He opined that the fire originated from the Form 3 or Form 4 rooms, but again this was contrary to the unchallenged evidence of the students, PW2, PW5, PW13 and PW14, that when they awoke, there was no fire in the rooms, only a glow from the hall. His opinion was untenable. With regard to the cause of the fire, DW9 said that the fire could have been electrical, either as a result of a short circuit or loose contact resulting in resistive heating. He admitted that he came to those conclusions based on hearsay evidence. Nevertheless, his opinion that resistive heating was a possible cause was consistent with PW3's evidence.

After careful consideration of the evidence, I preferred the evidence of PW3 for the reasons stated below. He explained that in order to determine the cause of the fire, one has to determine its origin. He was of the view that it originated in the roof void, after studying the fire structure. As evidenced by the photographs annexed to his report, it is clear that most of the damage was to the roof and first floor of the building while the ground floor was relatively intact except for the wardens' room and parts of the hall (photos 46–61, 26–29). His opinion that falling debris had caused the mattresses to burn and that the mattress fire had charred the walls and ceiling was entirely plausible as the charred portions were near the two beds. It is also consistent with the evidence of PW5 and PW9 that their room was not on fire and even when PW9 left the room, he only saw thick smoke and not fire. This supports PW3's opinion that the fire in portions of the ground floor, were due to falling debris at a later stage of the fire.

He explained that when fire originates from inside a room, the fire would rise to the ceiling due to the buoyancy of the hot gasses. If the ceiling

A is intact, the fire would spread horizontally at the ceiling until some part of the compartment fails. In the majority of buildings, the window glass being the least resistant would be the first to go, allowing fire to vent from the windows and leaving clear evidence of flame escape. However, if the ceiling is breached first, the buoyancy of the gasses would create a chimney effect with the fire gasses venting from the top of the compartment and B combustion air drawn in through the windows even if there are window openings. In this case, there was no evidence of flame escape, leading PW3 to conclude that when the fire developed on the first floor, the roof had been destroyed. He was also of the view that the even fire damage on the first floor was indicative of a fire that was already fully developed before the first C floor was involved. Had the fire started in any part of the first floor, all things being equal, the damage would have been worst there, the fire having burnt longest at that spot.

Christopher Khoo ('PW1'), a passerby who was at the scene at 2.57am and stayed to raise the alarm and render assistance testified that he saw D flames twice the height of the house at the portion of the roof over the Forms 3 or 4 rooms. He confirmed that only the roof was on fire when he first arrived. Based on his evidence and that of the students who testified that their rooms on the first floor were not on fire when they sought to make their escape, I had no difficulty in accepting PW3's evidence that the fire originated from the roof.

E According to the PW3, since the fire originated from the roof void, there were only two plausible causes, ie electrical fault or ignition of part of the roof structure by a stray firework. Two possible causes were resistive heating or short circuit. He ruled out a short circuit as there was no evidence of a blown fuse. Resistive heating results from a dirty or loose connection in F an electrical circuit, and the amount of heat generated would depend on the electrical rating of the appliance connected to the circuit. In the instant case, the only appliances capable of generating this sort of fault were the water heaters, of which only the one in the Form 6 room was working.

There is no dispute that spent fireworks were found in the grounds and G that the fire occurred in the Chinese New Year period. Based on the evidence, PW3's opinion as to the two plausible causes of the fire was reasonable and unchallenged, and I accept it. The plaintiffs conceded that they do not lay the blame for causing the fire at the defendants' door. However, they argue that the defendants were under a duty to take certain measures to prevent or minimize damage and injury due to the fire. There H is no dispute that the building was in existence even before 1922. PW3 was the only witness to express any opinion as to the fire resistance of the building. He defined fire resistance to mean the period for which the structure will retain its structural integrity and maintain the temperature on the non-exposed side of that structure at a temperature low enough not to create a hazard on the other side. In the context of that definition, he was of I the view that each element of the structure had a fire resisting period of very much less than an hour. He volunteered the opinion that a fire test would have to be done to determine the precise fire resisting period but he

estimated that the timber floor had a fire resisting period of $^1/_4$ hour, based on his experience. This was not challenged and I accepted it. A

There was only one staircase leading from the upstairs hall to the ground floor. It did not qualify as a final exit as it did not discharge one to safety outside the building. The only staircase which gave direct access to a final exit was adjacent to the Forms 3 and 4 rooms, but this had been permanently sealed with floorboards (photos 20–22). PW3 was of the opinion that if it had not been sealed off, there may have been no loss of life as all the fatalities occurred among the occupants of those two rooms who had desperately tried to seek an exit. From the photographs, the staircase appeared relatively intact. All the windows had been rifted with fixed grilles or BRC mesh except for one marked 'T' on P1B (on the first floor) from which PW2 jumped. There were no other secondary exits although there was no shortage of exits on the ground floor. It is undisputed that there were three dry powder fire extinguishers, two on the ground floor and one on the first floor but according to PW3, they were not placed on exit routes except for the one in the kitchen, which could arguably be said to be so placed. PW3 testified that had he been asked to do a fire survey, he would have recommended a total of nine fire extinguishers per floor, including water extinguishers. Rather than an open staircase, there should have been at least two protected staircases from the first floor. There should also have been a hose reel with a reliable supply of water and smoke detectors at ceiling level on both floors and in the roof void. As the building was to be used as a hostel for students aged between 15–17, it was especially important that they be given fire drills, taught to use fire fighting equipment and acquainted with escape routes. There was no emergency lighting in the entire building. It is common ground that although they had occupied the premises for more than one year before the fire, the first defendant had never conducted any fire drills or taught the boys how to use the fire extinguishers. B C D E F

It could hardly be said that fire was not a foreseeable risk. Indeed DW2 was clearly aware of such a risk since he had installed the fire extinguishers and had them serviced. In the approval letter of the MPPP (p 19 of Bundle A), condition (e) was that the premises were to be used as a hostel 'dan kegunaannya tertakluk kepada kelulusan daripada jabatan-jabatan yang berkenaan termasuk penukaran kegunaan serta keperluan dari segi perlindungan kebakaran, jika perlu'. It was undisputed that DW2 did nothing to comply with this condition and the MPPP did nothing to ensure compliance. DW2 did not consult the Fire Department regarding fire prevention measures although he did comply with condition (f) by taking out fire insurance. DW2 merely assumed that the approval of his application by the MPPP meant that it was safe and suitable for its intended use. He also admitted that neither of the wardens was given any instructions regarding fire safety. G H

In the case of *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103, the Federal Court held that (at p 104): I

> ... by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care for the safety of the pupil. The

A duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take care of his own children.

B Applying this principle to the facts, I found that the first defendant having undertaken to accommodate the students in the premises was under a duty to protect them from known dangers or those that should be apprehended. For the reasons set out, the danger from fire was definitely one which was foreseeable, and had the first defendant taken the steps or perhaps even some of the measures on fire prevention recommended by PW3, damage C could have been minimized, if not averted. It was obvious from the evidence of the students that they only became aware of the fire after it had been burning for some time. Had an alarm been installed, they may have been aware of it earlier and gained valuable time in ensuring a safe exit. Doubtless, PW3's recommendations may have been given with the benefit of hindsight, but in my view, some of the measures should have been taken D had the persons in charge applied their minds to the risk of fire or obtained the advice of the Fire Department. On the facts and the law, I found the first defendant negligent and liable to the plainfiffs.

I also accepted the submissions of learned counsel for the plaintiffs that the first defendant was liable under the head of occupier's liability. The E case of *Maclenan v Segar* [1917] 2 KB 325 was relied on. There it was held that:

> Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and F skill on the part of any one can make them. The rule is subject to the limitation that the defendant is not to be hold responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the promises.

G Applying this principle to the facts, the first defendant was also liable for breach of the warranty that the premises were as safe for the purpose of a hostel as reasonable care and skill on the part of anyone could make them.

The plaintiffs also submitted that the first defendant had contravened the provisions of the Uniform Building By-Laws 1986 ('the UBBL'). It was further submitted that the second defendant being the enforcement H authority of the UBBL was liable to the plaintiffs for failing to enforce it. It is common ground that the UBBL came into force for the State of Pulau Pinang on 1 January 1986. Parts VII, VIII and IX and the Schedules of that statement deal with fire requirements and the issue in dispute is whether these apply to the said premises.

I By-law 254 reads:

> Buildings which on the date of commencement of these By-laws have been erected, or in the course of being erected or have not been erected but plans

have been submitted and approved, and which according to by-law 134 fall within the classification of Place of assembly, Shop, Office, Other.

Residential and buildings exceeding 18.5m and buildings which are classified as hazardous or special risks shall be modified or altered to comply with Parts VII and VIII of these by-laws within:

(a) one year from the date of commencement of these by-laws in the case of buildings up to three storeys; and

(b) three years from the date of commencement of these by-laws in the case of buildings exceeding three storeys.

Learned counsel for the second defendant submitted that the by-law must be read conjunctively. This leads to the situation that Parts VII and VIII can only apply to buildings which fall within one of the classifications under by-law 134, exceed 18.5m in height and are classified as hazardous and special risks. Several authorities were submitted on the interpretation of statutes. In *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189, the House of Lords held that the duty of the court is to interpret the words which the legislature has used; 'those words may be ambiguous, but even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited'. Also, in the case of *Commissioner of Stamps, Straits Settlements v Oei Tjong Swan & Ors* [1933] Vol II SSR 107, His Lordship, Lord Macmillan in delivering the judgment of the Privy Council observed that the best and safest guide to the intention of the legislature is afforded by what the legislature said.

Even applying the principle in these cases, I am of the view that the by-law should be read disjunctively as there would otherwise be no need to repeat the word 'building' after the second and third 'and'. By contrast, there is no 'building' after the first 'and'; so that there are three distinct categories of buildings.

In the case of *Public Prosecutor v Sharikat Perusahaan Makanan Haiwan Berkerjasama-sama* [1969] 2 MLJ 250, reg 5 of the Food Control (Rice Milling) Regulations 1950 made under the BMA Food Control Proclamation, fell under consideration. The regulation reads:

> No person shall work or operate any mill driven by a machine or an engine for the purpose of milling padi into rice or for polishing rice save under and in accordance with the terms and conditions of a licence issued in that behalf.

It was agreed that a regulation under the BMA Food Control Proclamation must be consistent with the Control of Supplies Act 1961, in order to have any force at all.

Section 6(1) gives the minister power to make regulations to carry into effect the provisions of the Act and s 6(2)(i) authorizes him to regulate and control the 'milling of padi and the polishing of rice and the sale thereof'. It was argued for the respondents that the use of the word 'and' in s 6(2)(i) between the words 'milling of padi' and 'the polishing of rice' and again repetition between the words 'the polishing of rice' and the 'sale thereof' indicates that the word 'and' was to be read conjunctively. In other words, the regulation and control must relate to that whole and unbroken process

of milling, polishing and sale. Sharma J rejected the argument and observed that it ignored the provisions of s 6(1) and the opening words of s 6(2) of the Act. His Lordship held that 'it was occasionally necessary to read the conjunction "and" as if it were "or" so that the meaning and the intent of the legislature can be carried out.'

In the instant case, as rightly pointed out by learned counsel for the plaintiffs, reading the word 'and' in by-law 254 conjunctively would mean that the UBBL would not apply to a building carrying out the most hazardous operations if, for example, its height did not exceed 18.5m. This would be contrary to the intent of the legislature as the UBBL clearly aim to promote fire prevention and safety. Following the case of *Syarikat Perusahaan Makanan Haiwan Berkerjasama-sama*, this is one of the cases where the word 'and' must be read as 'or' to carry out the meaning and intention of the legislature.

In my view, the premises in question fall into the first category. There is no dispute that they were built before 1922 and there are approved plans in respect of them.

By-law 134 provides, inter alia, that:

> For the purpose of this Part every building or compartment shall be regarded according to its use or intended use as falling within one of the purpose groups set out in the Fifth Schedule of the By-law ....

The Fifth Schedule designates five purpose groups. Counsel for the second defendant argues that the premises fall within the first purpose group, ie 'small residential' which covers private dwelling houses. In this case, there is no doubt that the house was used as a hostel.

The plaintiffs rely on the case of *Hobson v Tulloch* [1898] 1 Ch 424, in which it was held that a covenant not to use a home 'for any trade or manufacture, or for any other purpose other than a private residence' was broken by using it as a boarding house for scholars attending a school in the neighborhood kept by the owner of the house in question. It was held that such user converts the house from private residence to the business of boarding house.

The facts are on all fours with those in the instant case. By using the house as a hostel for the students attending the school run by the first defendant, the first defendant had converted the house to the business of boarding house. On the facts, the premises did not fall under group II, IV or V, but clearly fall within category III, ie 'other residential' since it was used as accommodation for residential purpose other than any premises comprised in groups I and II. It follows that Parts VII and VIII of the UBBL applied to the premises, yet there was clearly no attempt by either defendant to comply with its requirements.

By-law 166 provides that except as provided by by-law 167, there shall be not less than two separate exits from each storey. By-law 167 provides that except as provided for in by-law 194, there shall be at least two storey exits for every compartment. 'Storey exit' is defined in by-law 133 and means a fire rated door to a protected staircase or a corridor protected with

fire resisting structure in accordance with the Ninth Schedule. In the instant case, there was no protected staircase or corridor as prescribed. By-law 194 has no application to this case. Even if it can be proved that the top most floor does not exceed 12m in height, the premises were not used for any occupancy other than for domestic or office purposes. It was used for the business of a boarding house. Although PW3 had expressed the opinion that the fire resisting period of each element of the structure was much less than an hour, no tests had been done in accordance with BS 476; Part 1:1953 (see by-law 133). Nonetheless, since at least one of the conditions of by-law 194 had not been complied with, the by-law did not apply.

There were no emergency exit signs in the premises as required by by-law 172. There were no means of detecting fire (see by-law 225(1)). Fire extinguishers were not in prominent positions on exit routes (see by-law 227). Water storage capacity and water flow rate for fire fighting systems in accordance with the Tenth Schedule were required by by-law 247. In the Tenth Schedule, the requirements were set out according to the category of use and category 'Other Residential' was further divided into sub-groups including '2. Hostels and Dormitories'. This is clearly the category into which these premises fall. For two to three-storey buildings in that category of use, there is a requirement for a hose reel, a manual electrical fire alarm system and single point unit emergency illumination. PW3 had testified that there was no hose reel, worse still, the water pressure was too low, there was no more than a drip from the taps in the Form 4 bathroom when the students tried to obtain water on the night of the fire. Indeed, the problem of low water pressure had been brought to the attention of the landlord, the MPPP by letter D26 and a reply given by letter D28 dated 19 November 1987. In spite of awareness of this problem, nothing was done by either party to ensure that there was water storage required for the hose reel as set out in the Tenth Schedule. There was also no emergency power system as required by by-law 253.

It is clear from the submissions for the second defendant that there was no need to comply with the UBBL because the premises were to be classified under the purpose group 'small residential', and the provisions did not apply. For the reasons stated, I am of the opinion that their classification was wrong.

I accept the submission for the plaintiffs that the second defendant was liable for the injury and damage caused by their failure to enforce the provisions of the UBBL in their capacity as local authority entrusted with that responsibility and also in their capacity as landlord.

In the case of *Tok Jwee Kee v Tay Ah Hock & Sons Ltd & Town Council, Johore Bharu* [1969] 1 MLJ 195, the plaintiff claimed a declaration that the approval of the building plans by the Johore Town Council was contrary to the Town Boards Enactment. He also sought damages against the council and the owner of the land on which the building was built. It had been alleged that there had been a breach of building by-laws but the only damage alleged was damage to the appellants property from failing cement plasters. The Federal Court considered the provisions of the Town Boards

A Enactment and the by-laws made thereunder. Section 145 provided that the Board shall refuse to approve the plan of any new building unless it was in conformity with the approved plan. The Federal Court hold that the prohibition in s 145 is clearly a statutory duty imposed on the council and the council is liable in damages for breach of that duty if it is thought that the duty is for the benefit not of the public generally but of individuals or of B a particular or definable class of the public, provided that the Enactment provides no remedy, civil or criminal for such a breach. It was also held that the same principle applies to the by-laws. On the facts of the case, it was held that the duty imposed by s 145 is owed not to the public, but to a broad class — a particular definable class of the public of which the plaintiff was C one.

In the instant case, the UBBL were made in accordance with the provisions of the Street Drainage and Buildings Act 1974. It cannot be denied that the MPPP as the local authority must be under a statutory duty to enforce the Act and its by laws although there is no provision in such clear terms as s 145 in *Tok Jwee Kee*'s case. It was also the owner and landlord. D Following *Tok Jwee Kee*'s case, it can also be said that they owed a duty to a particular definable class of the public, ie the occupants of the premises in question, to ensure compliance with the UBBL.

Learned counsel for the first defendant and the plaintiffs also relied on the case of *Anns & Ors v London Borough of Merton* [1977] 2 AER 492, in E order to attach liability to the second defendant. In that case, the plaintiffs claimed damages against the council for negligence by the servants or agents in approving the foundations on which a block of maisonettes had been erected and/or in failing to inspect the foundations. The House of Lords considered whether the council were under a duty of care towards the plaintiffs who were lessees of the maisonettes which had suffered from F various defects. It was held that although the Public Health Act 1936 and the by-laws did not impose a duty on the council to inspect the foundations, it did not follow that a failure to inspect could not constitute a breach of the common law duty of care; it was the duty of the council to give proper consideration of the question whether they should inspect or not. The council would be liable to the plaintiffs if it were proved that in failing to G carry out an inspection, they had not properly exercised their discretion and had failed to exercise reasonable care in their acts or omissions to secure that the by-laws applicable to the foundations were complied with.

Ann's case was overruled by the House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908 but only insofar as to say that a local H authority was not liable in negligence to a building owner or occupier for the cost of remedying a dangerous defect in the building which resulted from the negligent failure of the authority to ensure that the building was designed or erected in conformity with the accepted standards prescribed by the building regulations or by-laws but which became apparent before the defect caused physical injury, because the damage suffered in such I circumstances was not material or physical damage but the purely economic loss of the expenditure incurred in remedying the defect to avert the danger or in abandoning the building. In the instant case, the loss suffered by the

plaintiffs was certainly not purely economic but material and physical damage. A

The second defendant sought alternatively to rely on s 95(2) of the Street, Drainage and Building Act 1974:

> The local authority (D2) or officer or employee of the local authority shall not be subject to any action, claim, liabilities or demand whatsoever arising out of any building or other works carried out in accordance with the provisions of this Act or any by-laws made thereunder (UBBL 1986) or by reason of the fact that such building works or the plans thereof are subject to inspection and approval by the local authority and nothing in this Act or any by-laws made thereunder shall make it obligatory for the local authority to inspect any building, building works or materials to ascertain that the provisions of this Act of any by-laws made thereunder are complied with. B C

After studying the provision, I agree with learned counsel for the plaintiff that the immunity conferred by the section is in relation to 'works carried out in accordance with the provisions of this Act or any by-laws made thereunder'. As no works were carried out in respect of this case nor any plans submitted, the section is not applicable. D

Had the second defendants ensured compliance with the UBBL, there is little doubt that all the occupants could have escaped death if not injury. As pointed out, a fire alarm would have alerted them much earlier. If there had been a second staircase, the Forms 3 and 4 boys could have used that since they were misled by the glow from the hall in presuming that the main staircase was on fire. A hose reel with the required water storage capacity could have proved vital in fighting the fire, as would fire extinguishers strategically placed. E

In the circumstances of the fire, it was inevitable that the boys panicked. PW2 described their efforts in trying to break open the BRC mesh at the windows. Their efforts to obtain water faded as there was no water from the taps. Ultimately, PW2 jumped from the first floor window marked 'T' in P1B. In the circumstances, he could not be blamed for not failing to make a more timely escape nor could he have been held contributorily negligent for the injuries suffered by him, which were incurred directly as a result of his trying to escape. F G

On the evidence, the boys had acquitted themselves as well as could be expected and certainly better than the two adults charged with looking after them. PW1 said that both wardens were in a state of panic. Both pushed their motorcycles from the house. Although DW1 testified that Frederick Augustin tried to use a fire extinguisher but failed, there was no evidence that he helped the boys to escape in any way. PW5 confirmed that it was one of the other boys, William, who urged him to run out of the house, which he did in spite of the thick smoke outside his room. He saw neither DW1 nor Frederick Augustin shouting at the boys to tell them to get out. This was left to PW1 and the boys who had escaped. DW1 was more intent on saving his belongings than his charges. He was mindlessly removing his belongings even as PW2 called to him for help in moving him away from the house after jumping down from the window. When even adults had reacted H I

as DW1 had done, there can surely be no criticism levelled against teenaged boys who, though terror stricken had done their best to save themselves. They had never participated in any fire drills nor been given any instructions on what to do in the event of a fire. In the circumstances, I found no contributory negligence against the plaintiffs, and found both defendants equally to blame, as submitted by learned counsel for the plaintiffs and the first defendant.

Quantum

Cases 53–26, 27, 28 and 33–92 involve fatalities and it was agreed that on proof of 100% liability the plaintiffs in each of the cases were entitled to RM10,000 as bereavement apart from Surin Thinagaran whose charred body was found at the scene, the other three boys only died after a lapse of time. However, there was no evidence as to whether they were in a coma or underwent pain and suffering. There being no claim under this head, no award was made for pain and suffering (see *Thangavelu v Chia Kok Bin* [1981] 2 MLJ 227). Agreed special damages in each of the cases were RM3291.50, RM3040.50, RM5040.50 and RM12,500 respectively. In 53–26–92, item 4 of the special damages was disputed although there is no dispute that the plaintiff had paid PW3 the sum of S$13,296.20 for the preparation of his report, P5. P5 was a comprehensive report supported by photographs and plans relied on not only by the plaintiffs but also by the defence. It was invaluable in assisting the court to form conclusions about the fire. The other reports D29 and D32 were certainly not of much assistance as they were not as detailed or lucid. I am of the view that the expense incurred was not excessive for the degree of expertise that it bought and I allowed it.

53–25–92–(Yong Yit Swee)

The plaintiff suffered burns on 50% of his body and underwent six operations. He carries permanent scars on the front and back of the trunk of his body and on all four limbs. He suffers permanent disabilities set out in P13, P14 and P25. In the case of *Pengarah Institut Penyelidikan Perubatan & Anor v Inthra Devi & Anor* [1988] 1 MLJ 19, the plaintiff sustained 65% first and second degree burns involving parts of the face, trunk, both thighs and both upper limbs. She underwent surgery on two occasions where areas with skin loss were covered with skin graft. She developed keloid scars on almost the whole of the front of the body left upper limb, both thighs and areas behind the knees and legs. She would require RM3,000–RM5,000 annually for surgical rehabilitation. She was also found to require indefinite psychiatric therapy throughout her life. She was awarded RM80,000 for general damages apart from awards for plastic surgery and the cost of psychiatric therapy.

Applying that case, I awarded the sum of RM70,000 as general damages. The injuries and disabilities are comparable to those in *Inthra Devi*'s case. Moreover, *Inthra Devi*'s case was decided eight years ago and

the effects of inflation should be considered. In the circumstances, the award was not excessive.

53–29–92 (Lee Seng Choong)

The plaintiff suffered 50% third degree burns and underwent six operations — P15 and P24 referred to. P15 mentions the severe pain and suffering he had undergone. He has thick scars over both sides of his neck, on his chest and both thighs. He has contractures of the neck, both hands, ankles and feet. His hands are severely deformed. There are permanent disabilities. Applying *Inthra Devi*'s case, I awarded RM80,000 for the burns, scars and associated disabilities.

For the loss of his right little finger, and the severe contracture of his right hand, I assessed the sum of RM30,000 based on the case of *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71. In that case, the plaintiff was awarded RM15,000 for pain and suffering and loss of amenities, associated with the loss of two middle fingers and part of the index finger of the right hand. This case was decided in 1982, more than 13 years ago and in view of the plaintiffs injuries and disabilities which were more serious, I awarded the sum of RM30,000. Total general damages of RM110,000 were awarded. Agreed special damages of RM7151.20 were also awarded.

53–30–92 (Vigneshwara)

He suffered superficial to deep dermal or full thickness burns on 30% of his body with keloid scars on both arms and some limitations of movement of his left hand. He has undergone two operations (P16 and P17 referred to). In the case of *Low Mei Yong (An Infant) (Spinster) suing by her mother and next friend Ng Chen Fong (mw) v Yeoh Geok Keow (mw)* (*Dass on Quantum in Accident Claims*, Vol III, 374, the four year old plaintiff sustained 4% friction burns over her right upper thigh which required skin grafting. Apart from some hypertrophic scars, there was no other disability. She was awarded general damages of $9500 in 1982.

In this case, the plaintiff's burns covered a far greater part of his body and left keloid scars. He also had some limitation of movement which was not suffered by the plaintiff in *Low Mei Yong*'s case, which is a 13 year old decision. In the circumstances, I awarded a sum of RM30,000 for general damages and RM14,578 agreed special damages.

53–31–92 (Yap Lip San)

He suffered 70% body burns and underwent six operations (exh P18 refers). There is no doubt his injuries were serious but there was no evidence of any residual disabilities. Based on the authority referred to in 53–25–92, he was awarded general damages of RM50,000 based on the case of *Low Mei Yong*. His burns covered a greater portion of his body compared to the plaintiff in *Low Mei Yong*'s case and the award is justifiably greater.

A For the closed fracture of the neck of the femur associated with four operations and 3cm shortening, I awarded the sum of RM26,000 (exhs P19, P20, P21 and P22 referred to). In *Victor Alphonse Sebastian & Ors v Lee Ah Leek* [1987] 2 MLJ xxi, general damages of RM33,000 were awarded for a fracture of the right midshaft femur with 1.5cm shortening, inability to squat and pain in his right knee.

B I awarded the sum of RM26,000 as general damages for pain and suffering and loss of amenities, as the disabilities were fewer although the shortening was more.

Learned counsel for the second defendant had submitted that the injury to the femur was too remote. I rejected this submission as I found that the C fracture was directly related to his attempt to escape the fire. He had jumped to effect a hasty escape which was what the second defendant demanded of the teenaged occupants and they should not be heard to argue that the damage caused in such attempt was too remote. Agreed special damages of RM6,000 were also awarded.

D In my view, the damages awarded were not excessive but reasonable, in view of the facts and authorities. Interest on general damages was awarded at 8% per annum from the date of service of summons till the date of judgment while that on special damages was 4% per annum from the date of accident till date of judgment. Interest on the judgment sum was awarded at 8% per annum from the date of judgment till satisfaction. Costs were also E awarded.

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